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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

September 19, 1994

Mr. John Cimko, Chief
Mobile Services Division
Federal Communications Commission
Room 644; Mail Stop 1600D
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comment of GTE Service Corporation, on behalf of its Telephone and Personal Communications Companies, in Opposition to the Petition of the People of the State of California and the Public Utilities Commission of the State of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service within the State of California
PR File No. 94-SP3; DA 94-876

Dear Mr. Cimko:

Transmitted herewith, on behalf of GTE Service Corporation and its Telephone and Personal Communications Companies ("GTE"), are an original and four copies of its Comment in Opposition to the Petition of the People of the State of California and the Public Utilities Commission of the State of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service within the State of California.

GTE is submitting a telecopied signature on the Declaration of Philip L. Forbes. GTE will provide the Commission with the original signature of Mr. Forbes as soon as it is obtained. Should you have any questions in this regard, please do not hesitate to contact the undersigned counsel.

Sincerely,

William J. Sill
Christine M. Crowe
Counsel for GTE Service Corporation, on behalf of its Telephone and Personal Communications Companies

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the People of the State of California and the Public Utilities Commission of the State of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service within the State of California	)	PR File No. 94-SP3 DA-94-876

COMMENT OF GTE SERVICE CORPORATION, ON BEHALF OF ITS TELEPHONE AND PERSONAL COMMUNICATIONS COMPANIES, IN OPPOSITION TO THE PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA REQUESTING AUTHORITY TO REGULATE RATES ASSOCIATED WITH THE PROVISION OF CELLULAR SERVICE WITHIN THE STATE OF CALIFORNIA

GTE SERVICE CORPORATION
ON BEHALF OF
ITS TELEPHONE AND PERSONAL
COMMUNICATIONS COMPANIES

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September 19, 1994

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SUMMARY

GTE Service Corporation ("GTE"), on behalf of its Telephone and Personal Communications Companies, hereby files its Comment ("Comment") in Opposition to the Petition of the People of the State of California and the Public Utilities Commission of the State of California ("CPUC") Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service Within the State of California ("Petition"). GTE respectfully submits that the Petition fails to satisfy Section 20.13 of the Federal Communications Commission's ("FCC" or "Commission") Rules and does not provide the FCC with sufficient evidence to meet the high evidentiary burden necessary to preclude the statutorily-mandated preemption of state regulation of cellular service rates.

By enacting the Omnibus Budget Reconciliation Act of 1993 ("OBR"), Congress empowered the FCC to: a) preempt state regulation of cellular rates; and b) forbear from enforcement of certain Title II regulations. In Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("2nd R&O"), 9 FCC Rcd. 1411 (1994), the FCC found that preemption of state regulation was warranted unless a state filed a petition which provided convincing evidence demonstrating that market conditions in a state do not adequately protect subscribers from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory. The FCC enacted Section 20.13 which

explicitly outlines the rigorous evidentiary showing a state would have to make in order to retain jurisdiction over rates.

When the CPUC's Petition is evaluated in light of the exacting standards of Section 20.13, it becomes clear that the Petition must be either dismissed or denied. The Petition is based upon flawed analysis and data which yield conclusions which are neither supportable nor valid. Contrary to the CPUC's conclusions, cellular carriers such as GTE have constructed and expanded their cellular systems at a record pace, constantly increasing the area and quality of service while rates have decreased in real terms. GTE believes, and the attached economic study from Charles River Associates demonstrates, that competition exists in the cellular marketplace and there will be increased competition in the wireless marketplace as a result of the emergence of wide area SMR and PCS.

The CPUC's evaluation of competition in the cellular marketplace is flawed in several ways. First, the Petition fails to acknowledge the competitive effect of existing alternative services in addition to the presence of the other facilities-based cellular carriers and resellers. Not only do customers have the choice of cellular service provider, customers also have the option to utilize paging and SMR services to satisfy their mobile telecommunications needs. The Petition unrealistically rejects all other services currently offered as substitutes for cellular services,

apparently requiring that services be perfect substitutes for cellular service in order to have any competitive impact. This narrow view simply does not reflect reality.

Second, the CPUC underestimates the additional positive impact which new market entrants will have on competition in the marketplace by overestimating the structural, technological, marketing and financial hurdles which they must overcome. A closer review reveals these hurdles to be either nonexistent or insignificant.

Third, the Petition's reliance upon rate of return is misplaced, and the manner in which certain rates of return are utilized is misleading. The FCC has previously declined to utilize rate of return regulation for wireless services, and the CPUC itself has rejected cost-based regulation of cellular rates in light of the diverse costs experienced by cellular carriers. Notwithstanding these precedents, the CPUC now utilizes rate of return in its analysis. However, even if appropriate, the CPUC's utilization of these measurements is improper. Moreover, such measurements are utilized selectively in the Petition -- so the largest rates of return are highlighted and lower rates of return are relegated to an Appendix of the Petition.

Fourth, the rate trending provided in the Petition is so incomplete as to render it not only meaningless, but potentially misleading. The CPUC reviewed the rate trends of solely "basic" rates, i.e., the rate plans at which cellular

carriers in California first offered cellular service. Even though over 85 percent of GTE subscribers are on non-basic rate plans, the CPUC did not factor these plans into its rate trending analysis. Further undermining the validity of the rate trending is the utilization of nominal rates rather than real rates. As GTE documents in its Comment, GTE's cellular rates have fallen over the last five years, particularly when inflation is taken into consideration. These rate reductions are all the more remarkable as they have been accompanied by the introduction of new features, the enhancement of service quality, and increases in coverage areas.

There are two significant adverse consequences which would result from allowing the state to retain jurisdiction over rates. First, as several of the CPUC's present cellular policies conflict with those of the FCC, a decision to retain state jurisdiction would result in the preservation of policies inconsistent with those of the FCC. For example, the CPUC has deemed the concept of parity, which has been embraced by both the Congress and the Commission, a "red herring." Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications: Order Instituting Investigation, ("OII") I.93-12-007 at p. 17. Further, the CPUC has prohibited the bundling of rates and services even though the Commission has found it can be beneficial.

Second, retention of state jurisdiction over cellular rates would leave in place a regulatory framework which the CPUC has described as a "crazy quilt" of regulations rather than permitting the dynamics of a competitive marketplace to effectively ensure just and reasonable rates, the improvement of service quality, increase in coverage areas and introduction of new features. Moreover, the linchpin concept of the CPUC's regulatory philosophy, that competition will be furthered by establishing a built-in margin for resellers, has been discredited by the data provided by the CPUC in its Petition.

GTE respectfully submits that the CPUC's request is not in accord with the regulatory environment which Congress and the FCC envisioned. Rather than impose ever greater regulation which blunts competition, the answer is to remove regulatory barriers and allow competition to flourish in the wireless marketplace. The CPUC's Petition fails to meet the high standard imposed on any petition by Section 20.13 of the FCC's Rules. The Petition should be either dismissed or denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the People of the	)	
State of California and the	)	PR File No. 94-SP3
Public Utilities Commission of	)	DA-94-876
the State of California	)	
Requesting Authority to	)	
Regulate Rates Associated	)	
with the Provision of Cellular	)	
Service within the State	)	
of California	)	
	)	

COMMENT OF GTE SERVICE CORPORATION, ON BEHALF OF ITS TELEPHONE AND PERSONAL COMMUNICATIONS COMPANIES, IN OPPOSITION TO THE PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA REQUESTING AUTHORITY TO REGULATE RATES ASSOCIATED WITH THE PROVISION OF CELLULAR SERVICE WITHIN THE STATE OF CALIFORNIA

GTE Service Corporation ("GTE"), on behalf of its Telephone and Personal Communications Companies, pursuant to the Federal Communications Commission's ("FCC" or "Commission") decision in Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411 (1994), hereby submits its Comment ("Comment") in Opposition to the Petition ("Petition") of the People of the State of California and the Public Utilities Commission of the State of California ("CPUC") Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service within the State of California.[1] GTE

[1] Due to the CPUC's redaction of virtually all data it utilized to arrive at its conclusions, GTE has only its data concerning its own operations by which it can analyze the

Mobilnet Incorporated ("GTEM") and Contel Cellular Inc. ("CCI"), subsidiaries of GTE Corporation, are licensees or members of licensees in several California cellular MSAs and RSAs, and are thus directly affected by the CPUC's Petition. For the reasons delineated below, GTE respectfully requests that the CPUC's Petition be dismissed or, in the alternative, denied, for failure to satisfy the demanding standards which the Commission set forth in Section 20.13 of its Rules. 47 C.F.R. §20.13.

I. CONGRESS INTENDED FOR THE FEDERAL COMMUNICATIONS COMMISSION TO BE THE SOLE REGULATOR OVER RATES ASSOCIATED WITH THE PROVISION OF COMMERCIAL MOBILE RADIO SERVICES

A. CONGRESS HAS STATUTORILY PREEMPTED STATE REGULATION OF RATES AND ENTRY

In the Omnibus Budget Reconciliation Act of 1993 ("OBR"), Congress determined that regulation of rates and entry into the Commercial Mobile Radio Services ("CMRS") market would be most appropriately delegated to the federal government, specifically, to the FCC. Consequently, Congress preempted state regulation of rates and market entry, except in very limited circumstances.

CPUC's analysis and conclusions. Thus, GTE is restricted in its Comments to commenting upon: 1) the inappropriate analysis and concepts contained in the Petition; and 2) the incorrect conclusions reached by the CPUC concerning GTE's cellular operations and, in general, the operations of the cellular industry in the State of California.

Section 332(c)(3)(A) of the OBR provides:

> Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service

47 U.S.C. § 332(c)(3)(A).

B. CONGRESS GRANTED STATES A VERY LIMITED OPPORTUNITY TO PETITION FOR AUTHORITY TO REGULATE RATES

The OBR limits states to petitioning the FCC for rate authority to two instances: 1) to continue rate regulation which was in effect prior to June 1, 1993; or 2) to initiate rate regulation of any commercial mobile radio service. However, the OBR erected high hurdles over which a petitioner must vault in order to be successful:

> [A] State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that -
>
> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State. . .

47 U.S.C. § 332(c)(3)(A)(i)-(ii).

Even if a state meets these strict requirements, state regulation will be authorized only to the extent necessary to

maintain just and reasonable rates and avoid unjust or unreasonably discriminatory rates. Id. Moreover, such authority is temporary in nature.

C. THE CLEAR INTENT OF CONGRESS WAS TO GRANT THE FCC SOLE JURISDICTION OVER THE RATES ASSOCIATED WITH CMRS

It is clear from both the legislative history of the OBR and the OBR language itself that it was the intent of Congress that all rate and entry regulation with respect to CMRS be accomplished at the federal level, by the FCC. Indeed, the conference agreement between the House of Representatives and Senate expressly states:

> It is the intent of the Conferees that the Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment.

H.R. No. 2264 Conf. Rep. No. 213, 103d Cong. 1st Sess. p. 494 (1993).

II. BOTH CONGRESS AND THE FCC HAVE FOUND THE CELLULAR MARKET TO BE SUFFICIENTLY COMPETITIVE SO AS TO WARRANT FORBEARANCE FROM MANY TITLE II PROVISIONS AND PREEMPTION

A. CONGRESS FINDS COMPETITION WARRANTS FORBEARANCE AND PREEMPTION

When Congress enacted the OBR, thereby empowering the FCC to exercise regulatory authority over CMRS rates, Congress stated that inherent in the FCC's regulatory authority is the power to exercise its discretion with respect to forbearance from certain provisions of Title II regulation. Congress, by

granting the FCC the authority to forbear from specific regulation, "acknowledged that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace." Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("2nd R&O"), 9 FCC Rcd. 1411, 1418 (1994).

In accord with these conclusions, Congress preempted all state rate regulation in favor of uniform regulation by the FCC. In addition, Congress delegated to the FCC the responsibility for determining, with respect to particular services and marketplaces, whether forbearance and preemption are justified.

B. THE FCC FINDS FORBEARANCE WARRANTED AND PREEMPTION JUSTIFIED

In the 2nd R&O, 9 FCC Rcd. at 1478-9, the Commission decided to forbear from enforcing many provisions within Title II including, inter alia, Section 203 of the Communications Act, 47 U.S.C. §203, which requires carriers to file with the FCC a schedule of charges, terms and conditions associated with interstate service.[2] The FCC's decision to forbear from enforcing specific provisions of Title II was based upon its

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[2] The FCC's 2nd R&O did not alter the obligations imposed upon carriers pursuant to the Telephone Operator Consumer Services Improvement Act of 1990. See, In the Matter of Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd. 2744 (1991).

earlier tentative finding that "the level of competition in the commercial mobile radio services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users." Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, ("NPRM"), 8 FCC Rcd. 7988, 8000 (1993). The Commission acknowledged that PCS, cellular, paging and specialized mobile radio service carriers would comprise a large class of carriers which would vie for customers, and that none of these competitors would be dominant in the marketplace. 2nd R&O, 9 FCC Rcd. at 1470. With respect to cellular service in particular, the Commission found that "there is sufficient competition in this marketplace to justify forbearance from tariffing requirements." 2nd R&O, 9 FCC Rcd. at 1478-9. This accords with the tentative conclusion reached by the FCC in the NPRM, in which the Commission noted that its position was supported by the fact that the vast majority of states have not seen the need to regulate cellular rates. NPRM, 8 FCC Rcd. at 8000.

In the 2nd R&O, formally adopting the forbearance policy, the Commission buttressed its tentative conclusions concerning competition in the cellular marketplace, and crystallized its analysis which supports its conclusion that the cellular marketplace is sufficiently competitive to warrant forbearance from regulation. First, the Commission clarified that its previous classification of cellular carriers as "dominant" was

not based upon any evaluation of the competitiveness of the cellular marketplace. 2nd R&O, 9 FCC Rcd. at 1470. Next, the Commission cited previous Commission findings that cellular carriers face competition[3] and concluded, therefore, it is in the public interest to relax some policies traditionally applied to non-competitive markets. Id.

The Commission found that this competition has resulted in decreased costs of cellular service for consumers and a greater number of pricing structures tailored to the unique needs of consumers. See, 2nd R&O, 9 FCC Rcd. at 1470-1. With respect to the practical implications of regulation in a competitive marketplace, the Commission was cognizant of the fact that tariffing "imposes administrative costs and can themselves be a barrier to competition in some circumstances." 2nd R&O, 9 FCC Rcd. at 1478-9. Based upon the foregoing, the Commission found that the cellular marketplace was sufficiently competitive to warrant forbearance from the enforcement of tariff-filing requirements. Id.

The Commission found further that forbearance in this instance is in the public interest because tariffs (and the associated notice periods) can reduce a carrier's ability to respond quickly to changes in market demand and costs associated with the provision of service, and can reduce a carrier's incentive to provide new offerings and price

[3] E.g., Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd. 4028 (1992) [permitting the bundling of cellular service and equipment].

discounting since competitors who are apprised of future business plans have the ability to negate the competitive impact of a carrier's innovative offerings prior to their implementation. 2nd R&O, 9 FCC Rcd. at 1479. In addition, the FCC found that a market environment free from tariff filing obligations enhances competition in the marketplace, which increases the benefits derived by consumers. Id. In contrast, the filing and reporting requirements increase costs to carriers - costs which could be passed onto the consumer in the form of higher rates. Id. Moreover, the Commission found that tariff notice provisions which provide competitors with access to proposed rate restructuring and future proposed rates may actually encourage artificially high rates and may facilitate tacit collusion between the two facilities-based carriers. Id.

Simultaneous with the adoption of its forbearance policy, the Commission retained for itself, pursuant to Congressional mandate, the authority to ensure that cellular rates would remain just and reasonable, in accord with the public interest.[4] Thus, all criteria required to be satisfied prior

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[4] Further, the Commission made it clear that it intends to enforce these statutory provisions:

> In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act. Although we will forbear from enforcing our refund and prescription authority, described in

to the implementation of a forbearance policy have been fulfilled: 1) retention of statutory requirements contained within Sections 201 and 202 of the Communications Act (and their complementary enforcement provisions, set out in Sections 206, 207, 208 and 209 of that Act) ensures that rates will be just and reasonable; 2) since just and reasonable rates are, by definition, in the public interest, consumers need not be protected from such rates; and 3) forbearance was determined to be in the public interest because decreased regulation will provide cellular carriers with increased flexibility to respond to market conditions and customer demand.

The satisfaction of these criteria necessarily negates the validity of those allegations upon which a state petition for authority to regulate rates must be grounded: such petitions must contain evidence that rates are unjust and unreasonably discriminatory, and that consumers require protection from them. The petition assumes a violation of the Communications Act - which, even if true, is more appropriately remedied by enforcement of the Communications Act under the regulatory authority statutorily granted to, and retained by, the FCC.

> Sections 204 and 205, we do not forbear from Sections 206, 207, and 209, so that successful complainants could collect damages.

2nd R&O, 9 FCC Rcd. at 1479.

C. GTE SUBMITS THAT THE CELLULAR MARKETPLACE IS COMPETITIVE

The competitiveness of the cellular marketplace is central to the instant proceeding. GTE recently commissioned a study of wireless competition from Charles River Associates, Inc. ("CR"), a respected firm in the field of the economics of telecommunications markets. The resultant study, entitled Concentration, Competition and Performance in the Mobile Telecommunications Market (hereinafter "CR Study") concluded that the mobile communications marketplace is currently competitive and will become increasingly competitive with the introduction of additional wireless service providers, e.g., PCS and wide-area SMR, in the near future. See, Attachment A; and Sections III B (1), (4) and (5), infra. for a discussion of wireless competition.

GTE respectfully submits that individual state regulation is unnecessary, since the level of competition currently existing in the mobile communications marketplace provides carriers with the incentive to offer service at just, reasonable and competitive rates in order to maintain existing subscribers and to attract new ones.

III. THE CPUC'S PETITION TO REGULATE RATES DOES NOT SATISFY THE DEMANDING REQUIREMENTS OF THE FCC'S RULES

A. STATES SEEKING TO CONTINUE REGULATION OF CMRS RATES MUST SUBMIT A MARKET-ANALYSIS-INTENSIVE PETITION REQUESTING SUCH AUTHORITY, AND MUST MEET A HIGH BURDEN OF PROOF

In light of the benefits to be obtained from relaxed regulation in a competitive marketplace, Section 20.13 of the Commission's Rules establishes a high threshold showing for states petitioning the Commission to request authority to regulate cellular rates. States must produce sufficient concrete evidence to negate the Commission' s finding that the cellular marketplace is competitive and capable of producing just and reasonable rates. Section 20.13(a) of the Commission' s Rules requires each petition to include the following:

> (1) Demonstrative evidence that market conditions in the state for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Alternatively, a state's petition may include demonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the state or a specified geographic area have no alternatives [sic] means of obtaining basic telephone service. This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.
>
> (2) The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine conditions

and consumer protection by the Commission in reviewing any petition filed by a state under this section:

(i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state;

(ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider;

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable;

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state;

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry;

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state;

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative; and

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.

For the reasons discussed below, the Petition filed by the CPUC does not satisfy these demanding standards.

B. THE CPUC'S PETITION TO REGULATE CELLULAR RATES DOES NOT CONTAIN CONVINCING EVIDENCE OF A LACK OF COMPETITION IN THE CELLULAR MARKETPLACE OR OF THE EXISTENCE OF UNJUST OR UNREASONABLE OR UNJUSTLY OR UNREASONABLY DISCRIMINATORY RATES

Any state's petition, by its very nature, runs afoul of Congress' and the FCC's clearly-stated intent to preempt state regulation of rates. In order to frame its request in a way such that it satisfies Section 20.13, the CPUC must prove, by empirical, statistically supportable data and evidence, that the cellular market is not only non-competitive in nature, but also that such non-competitive atmosphere has resulted in the